90-164

No.

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1989

GERALD STRUBINGER,
Petitioner

v.

UNITED STATES POSTAL SERVICE,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PHILLIP R. KETE
Attorney for Petitioner
239 Park Avenue
Takoma Park, Md. 20912
(301) 891-2295

QUESTION PRESENTED

Do settlement agreements by federal civil servants stand on the same ground as similar agreements in other areas of law, so that they can be challenged on grounds of coercion or lack of consideration, or does something in the civil service law make them specially immune to those types of challenges?

PARTIES TO THE PROCEEDING

The only parties to the proceeding are those listed in the caption.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

No.

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1989

GERALD STRUBINGER,
Petitioner

v.

UNITED STATES POSTAL SERVICE,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioner Gerald Strubinger respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit entered on March 22, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported and appears as Appendix A to this petition. It is followed in the appendix by the court's judgment, entered the same day. The final decision of the Merit Systems Protection Board and the initial decision of the Merit Systems Protection Board are unreported and appear as Appendixes B and C, respectively.

JURISDICTION

The judgment of the Court of Appeals for the Federal Circuit was entered on March 22, 1990. No petition for rehearing was filed.

This Court is given jurisdiction to review the judgments of the Court of Appeals by 28 U.S.C. § 1254.

STATUTE INVOLVED

5 U.S.C. § 7701

> (a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation.

STATEMENT OF THE CASE

Although the question presented is purely one of law, a brief statement of the factual background may help put it into perspective.

Mr. Strubinger was a postal supervisor in Jim Thorpe, Pa. He was given a notice of proposed discharge for allegedly kiting checks and misappropriating funds, based on perceived irregularities in his handling of postal money orders. He denied the charges, and he then

appealed the adverse decision of the Postal Service to the Merit Systems Protection Board.

Two days before the scheduled March 1, 1989, hearing, the agency and Mr. Strubinger settled the appeal on the basis of reinstatement but to a lower ranking position in another city.

Based on the settlement agreement, the MSPB administrative judge entered an order dismissing Mr. Strubinger's appeal, which would be final thirty days later if neither party filed an objection with the full MSPB. Mr. Strubinger filed a timely objection, claiming his agreement to the settlement had been involuntary. The full board denied the petition for review, stating that no grounds for challenging the case's dismissal had been raised.

Mr. Strubinger obtained review by the Federal Circuit. He argued that under Schultz v. United States Navy, 810 F.2d 1133 (Fed.Cir. 1987), a federal agency's reliance on disciplinary charges which it knows cannot be substantiated constitutes improper coercion on the employee to leave his or her position.[1] He

---

[1] The critical language in Schultz reads as follows:

> [W]here an employee is faced merely with the unpleasant alternatives of resigning or being subject to removal for cause, such limited choices do not make the resulting resignation an involuntary act. On the other hand, inherent in that proposition is that the agency has reasonable grounds for threatening to take the adverse action. If an employee can show that the agency knew that the reason for the threatened removal could not be substantiated, the threatened action by the agency is purely coercive.

Schultz v. United States Navy, 810 F.2d 1133, 1136 (Fed.Cir. 1987) (emphasis added).

argued, in the alternative, that a settlement in which the agency did nothing but drop its reliance on claims it knew to be untrue is voidable because there is no true consideration for the employee's concessions. Skinner v. Cromwell, 40 F.2d 241 (10th Cir. 1930); Burns v. Northern Pac. Ry. Co., 134 F.2d 766 (1943); Fleming v. Post, 146 F.2d 441 (2nd Cir. 1944).

The Federal Circuit rejected Mr. Strubinger's claim. Although the court acknowledged that settlements are subject to attack, it held that Mr. Strubinger's claim that the charges against him were wholly without merit[2] (which would estab-

---

[2] Mr. Strubinger contended that the government could not have believed he was guilty of check-kiting, because there was not even an allegation of shuttling checks between two financial institutions, Williams v. U.S., 458 U.S. 279, 281 n. 1 (1982). There could not be misappropriation of funds, because there was

lish coercion under Schultz and lack of consideration under Skinner) was immaterial because the only grounds for invalidating a settlement are fraud and mutual mistake:

> A settlement may be vacated only if the petitioner demonstrates that the settlement agreement was "tainted with invalidity, either by fraud practiced upon him or by a mutual mistake under which both parties acted." Asberry v. United States Postal Service, 692 F.2d 1378, 1380 (Fed.Cir., 1982), quoting Callen v. United States R.R. Co., 332 U.S. 625, 630 (1948).
>
> Accordingly, Mr. Strubinger's claim that the charges against him were unsubstantiated was not material.

App. 2-3.

In rejecting the argument that the standards followed in Schultz apply to challenges to settlements, the court re-

---

no evidence that Mr. Strubinger ever issued himself a postal money order without first transferring the appropriate amount of cash into the Postal Service's custody.

iterated that only the bases identified in Asberry (as quoted just above) were applicable:

> Mr. Strubinger asked this court to extend Schultz v. United States Navy, 810 F.2d 1133 (Fed.Cir. 1987), to attempts to vacate settlements, and to require the MSPB to conduct a hearing into the voluntariness of his settlement. This we decline to do. The standard for vacating settlements is set forth in Asberry, and the petitioner has failed to meet that standard.

App. 3-4.

For the reasons that follow, the Federal Circuit's decision should be reviewed and set aside.

REASONS FOR GRANTING THE WRIT

The writ should be granted for two reasons. First, the Federal Circuit's holding that a settlement cannot be attacked for coercion or lack of consideration both violates this Court's holding in Maynard v. Durham & Southern R. Co., 365 U.S. 160 (1961) and imposes the circuit court's own policy preferences, in violation of the mandate of Callen v. United States R.R. Co., 332 U.S. 625 (1948).

Second, action by this Court is necessary at this time because, on the one hand, the Federal Circuit's violation of Maynard and Callen is firmly established and constitutes the rule governing a substantial amount of litigation while, on the other hand, the Federal Circuit's near-exclusive jurisdiction over various

subjects means that inter-circuit conflicts should not be awaited.

A. THE FEDERAL CIRCUIT'S BARRING OF SETTLEMENT ATTACKS FOR LACK OF CONSIDERATION IS IN DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT'S HOLDINGS THAT UNLESS CONGRESS CHANGES THE STATUTORY PLAN RELEASES OF RIGHTS UNDER FEDERAL LAW STAND ON THE SAME BASIS AS OTHER RELEASES AND THAT RELEASES UNDER FEDERAL LAW CAN BE CHALLENGED ON GROUNDS OF LACK OF CONSIDERATION.

The Federal Circuit's disposition of the present case rests on a belief that the only bases upon which a settlement agreement can be shown to be invalid are fraud and mutual mistake:

> A settlement may be vacated only if the petitioner demonstrates that the settlement agreement "was tainted with invalidity, either by fraud practiced upon him or by a mutual

> mistake under which both parties acted."

App. 2-3 (emphasis added).

From this, the court naturally concluded that "Mr. Strubinger's claim that the charges against him were unsubstantiated was not material," App. 3, as this claim, if true, would tend to prove coercion or lack of consideration, rather than fraud or mutual mistake.

The case from which the "either by fraud . . . or mutual mistake" language comes, Callen v. United States R.R. Co., 332 U.S. 625 (1948), did not hold that these were the only two bases for attacking a settlement. The contention in Callen was that settlements under the Federal Employers Liability Act stood on a different ground than other settlements, so that the burden of proof would rest on the party relying on the settlement rather than the party attacking it:

> We are urged, however, to decide . . . that the burden should not be on one who attacks a release, to show grounds of mutual mistake or fraud, but should rest upon the one who pleads such a contract, to prove the absences of those grounds.

332 U.S. at 629-30.

The Court noted there were serious policy arguments in favor of the contention, but inferred from this that the issue was indeed one of policy, to be determined by congress rather than the Court. 332 U.S. at 630. The Court concluded, therefore, that absent specific congressional action, releases under FELA must be challengeable only on the same bases as releases in other areas of the law: "But until the Congress changes the statutory plan, the releases of railroad employees stand on the same basis as the releases of others." 332 U.S. at 630.

By way of example, in the sentence identifying which party had the burden of

proof, the Court mentioned two of the bases for challenging releases:

> One who attacks a settlement must bear the burden of showing that the contract he has made is tainted with invalidity, either by fraud practiced upon him or by a mutual mistake under which both parties acted.

332 U.S. at 630.

It was not in Callen but in Maynard v. Durham & Southern R. Co., 365 U.S. 160 (1961), that this Court decided whether a settlement release could be invalidated on the basis of lack of consideration:

> We think the correct rule concerning the adequacy of consideration for a release of claims under the [Federal Employers' Liability] Act was stated in Burns v. Northern P.R. Co., (CA8 Minn) 134 F.2d 766, 770. "In order that there may be consideration, there must be mutual concessions. A release is not supported by sufficient consideration unless something of value is received to which the creditor had no previous right."

Maynard, 365 U.S. at 163.

In a challenge to a litigation settlement, the question of consideration concerns whether there was a valid dispute to be settled, i.e., whether the adversary had a bona fide position which was relinquished in return for the challenging party's concession. Salmeron v. United States, 724 F.2d 1357, 1362 (9th Cir. 1983), and the cases there cited; Skinner, Burns, and Fleming, cited above.[3]

The Federal Circuit's rejection of Mr. Strubinger's lack of consideration

---

[3] The Federal Circuit itself relies on the rationale discussed in Salmeron to hold that the waiver of the employee's appeal rights which is implicit in every resignation, Autera v. United States, 389 F.2d 815, 817 (Ct.Cl. 1968), can be disregarded if the employee resigned to avoid facing charges which the agency knew could not be substantiated. Schultz v. United States Navy, 810 F.2d 1133 (Fed.Cir. 1987). Although Schultz says that in such a case the resignation is "coerced," this notion seems identical to the saying that it was induced by illusory consideration.

claim solely because fraud and mutual mistake are the only grounds for attacking settlement is in direct conflict with this Court's Maynard holding. In addition, even though the Federal Circuit may perceive important policy benefits in applying to federal employment cases a rule different than that applicable to other cases, the holding in Callen bars it from enforcing its policy views until and unless congress "changes the statutory plan." 332 U.S. at 630.

In sum, the Federal Circuit's holding in this case is in direct conflict with the applicable decisions of this Court.

B. CERTIORARI SHOULD BE GRANTED IN THE PRESENT CASE BECAUSE THE STANDARD FOR CHALLENGING SETTLEMENTS IS FIRMLY ESTABLISHED IN THE FEDERAL CIRCUIT, IT IS IMMUNE FROM INTER-CIRCUIT CONFLICT, AND IT AFFECTS A SUBSTANTIAL NUMBER OF LITIGANTS EACH YEAR.

It is the position both of the government and the Federal Circuit that the holding in this case was dictated by the Federal Circuit's precedents. This is reflected in the fact that the panel determined unanimously that its application of Asberry and Schultz added nothing significantly or usefully to the body of law and had no precedential value. Fed.Cir. Rule 47.8. As for the government, it argued that Asberry so clearly bars invalidation of settlements on the basis of

Schultz-type coercion that Mr. Strubinger and his counsel should have been sanctioned for even presenting the argument to the contrary. Resp. Br. at 10-12. Thus, the limitation on settlement challenges cannot be corrected through further litigation in within the federal circuit itself.[4]

In addition the near-exclusivity of the Federal Circuit's jurisdiction over

---

[4] The clarity of the Federal Circuit's holding that settlements cannot be attacked on any ground but fraud or mutual mistake creates a problem when contrasted with this Court's holding in Maynard that a settlement can be attacked on the ground of lack of consideration. Conscientious counsel must tell clients whose cases fit the Maynard paradigm both that there is no doubt they are right and there is no doubt that the Federal Circuit will rule against them and they will have to respond to a demand for sanctions. This unhealthy state of affairs poses a serious strain on the integrity of the legal system, which should be relieved by certiorari since it cannot be otherwise attacked.

various categories of cases[5] makes inter-circuit conflict an inappropriate predicate for certiorari review. Schriber-Schroth Co. v. Cleveland Trust Co., 305 U.S. 47, 50 (1938).

Finally, more than a substantial number of litigants are subject to the Federal Circuit rule. According to the most recent statistics, nearly two thousand cases are settled each year within the MSPB alone.[6] U.S. Merit Systems Protection Board, Annual Report Fiscal

---

[5] Under 5 U.S.C. § 7703(d), the Federal Circuit has exclusive jurisdiction over all reviews from the MSPB except those raising employment discrimination claims. The Federal Circuit also has exclusive or near-exclusive jurisdiction over appeals from district court decisions in patent, trademark, customs, and government contract cases. 28 U.S.C. 1295(a).

[6] According to the MSPB, in 1988 the number of cases settled totalled 1,932. There were another 2,404 listed as "dismissed." It is not clear from the MSPB report which category contains cases which are dismissed because they are settled.

Year 1988, at 32. To these must be added all the trademark, patent, customs, and government contract cases which are settled each year. Although it is impossible to say in how many cases each year litigants succeed in forcing settlements on their adversaries simply by bringing and prosecuting bad faith litigation, it would be just as impossible to deny that the issue raised by this petition will continue to recur in the Federal Circuit as long as that court maintains its current policy in violation of Maynard and Callen.

CONCLUSION

The writ of certiorari should be issued to the U.S. Court of Appeals for the Federal Circuit.

Respectfully submitted,

Phillip R. Kete
Attorney for Petitioner

APPENDIX
TABLE OF CONTENTS

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

89-3364

GERALD STRUBINGER,
Petitioner

v.

UNITED STATES POSTAL SERVICE,
Respondent

DECIDED: March 22, 1990

Before MARKEY, Chief Judge, NEWMAN, Circuit Judge, and LIFLAND, District Judge.*

PER CURIAM.

DECISION

Petitioner Gerald Strubinger seeks review of a decision of the Merit Systems Protection Board ("MSPB"), MSPB Docket

---

* Judge John C. Lifland of the District of New Jersey, sitting by designation.

No. PH07528910109, that denied review of the initial decision of the MSPB dismissing plaintiff's appeal as moot. We affirm.

OPINION

The MSPB did not abuse its discretion in determining that: (1) Mr. Strubinger had not presented any new and material information that was unavailable at the time settlement was entered and the record closed, and (2) Administrative Law Judge Fishman had not based his decision on an erroneous interpretation of statute or regulation. The underlying dispute was resolved by the settlement agreement, and was no longer within the jurisdiction of the MSPB. Only information that went to the validity of the settlement was material. A settlement may be vacated only if the petitioner demonstrates that the settlement agree-

ment "was tainted with invalidity, either by fraud practiced upon him or by a mutual mistake under which both parties acted." Asberry v. United States Postal Service, 692 F.2d 1378, 1380 (Fed. Cir. 1982), quoting Callen v. United States R.R. Co., 332 U.S. 625, 630 (1948).

Accordingly, Mr. Strubinger's claim that the charges against him were unsubstantiated was not material. Mr. Strubinger's claim that the settlement was coerced by the presiding official is baseless. Assuming the truth of Mr. Strubinger's unsworn statements, they do not establish coercion.

Mr. Strubinger asked this court to extend Schultz v. United States Navy, 810 F.2d 1133 (Fed. Cir. 1987), to attempts to vacate settlements, and to require the MSPB to conduct a hearing into the voluntariness of his settlement. This we de-

cline to do. The standard for vacating settlements is set forth in Asberry, and the petitioner has failed to meet that standard.

Respondent's request for sanctions, pursuant to Rule 38, Fed. R. App. P., is denied.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

89-3364

GERALD STRUBINGER,
Petitioner,

v.

UNITED STATES POSTAL SERVICE,
Respondent.

JUDGEMENT

ON APPEAL FROM THE MERIT SYSTEMS
PROTECTION BOARD

IN CASE NO(S) PH07528910109

This CAUSE having been heard and
considered, it is
ORDERED and ADJUDGED: AFFIRMED.

Dated: Mar 22 1990

ENTERED BY ORDER OF THE COURT
/S/

FRANCIS X. GINDHART, CLERK

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

GERALD F. STRUBINGER, Appellant,	)	
v.	)	DOCKET NUMBER PH07528910109
UNITED STATES POSTAL SERVICE, Agency.	)	Date: Jun 15 1989

Thomas M. Blewitt, Esquire, Dunmore, Pennsylvania, for the appellant.

Felicia A. Adamski, Lehigh Valley, Pennsylvania, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Samuel W. Bogley, Member

ORDER

After full consideration, the Board DENIES the appellant's petition for review of the initial decision issued on March 3, 1989, because it does not meet the criteria for review set forth at 5 C.F.R. ' 1201.115. This is the Board's final order in this appeal. The initial

decision is now final. 5 C.F.R. ' 1201.113(b).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
PHILADELPHIA REGIONAL OFFICE

GERALD F. STRUBINGER, Appellant,	)	
v.	)	DOCKET NUMBER PH07528910109
UNITED STATES POSTAL SERVICE, Agency.	)	Date: March 3 1989

Thomas M. Blewitt, Lenaham & Dempsey, Scranton, Pennsylvania, for the appellant.

Felicia A. Adamski, Lehigh Valley, Pennsylvania, for the agency.

BEFORE

Frederick L. Fishman
Administrative Judge

INITIAL DECISION

INTRODUCTION

This is an appeal from a removal action. Gerald F. Strubinger was removed from the position of Superintendent of Postal Operations, by the U.S. Postal

Service, Lehigh Valley, Pennsylvania. The appellant initially requested a hearing but subsequently withdrew that request.

For the reasons set forth below, the appeal is DISMISSED.

JURISDICTION

The parties entered into a settlement agreement which has been placed into the record. As part of the agreement, the appellant withdrew his appeal with the Board. I have reviewed the terms of the settlement agreement and find it lawful and voluntarily entered into. Settlement agreements which are formally entered into the record may later be enforced by the Board. Richardson v. Environmental Protection Agency, 5 M.S.P.R. 248 (19811) and Hopson v. Defense Logistics Agency, 5 M.S.P.R., 247 (1981).

Since the appeal has been withdrawn before the Board has reached a decision on the matter, the appeal is moot and therefore is dismissed from further consideration before this office. See McCuller v. Department of the Interior, 18 M.S.P.R. 665 (1984); Codrington v. Department of Justice, 1 M.S.P.R. 333 (1980).

DECISION

The appeal is DISMISSED.

FOR THE BOARD:

Frederick L. Fishman
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on Apr. 07 1989, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is the last day on which you can file a pe-

tition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of the initial decision by filing a petition for review if you believe that the settlement agreement is unlawful, was involuntary, or was the result of fraud or mutual mistake. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, N.W., Suite 802
Washington, D.C. 20419

Your petition must be postmarked or hand-delivered no later than the date this initial decision becomes final. If you fail to provide a statement with your petition that you have either mailed or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

You may not file your petition with he court before this decision becomes final. To be timely, your petition must be <u>received</u> by the court no later than 30 cal-

endar days after the date this initial decision becomes final.

ENFORCEMENT

If the settlement agreement has been made part of the record, and the agency has not fully complied with the terms of the agreement after this initial decision has become final, you may ask the Board to enforce the settlement agreement by filing a motion with this office.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.